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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID NORKIN

Plaintiff,

-against-

Civil Action No. 05 Civ. 9137(DC)

DLA PIPER RUDNICK GRAY CARY LLP,

Defendant.

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DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT

Defendant DLA Piper Rudnick Gray Cary LLP ("Piper") moved to dismiss the complaint or for summary judgment in its favor. In his opposition, plaintiff David Norkin ("Norkin") concedes that he has no right to assert most of his claims and supports the rest with an affidavit that contradicts his prior testimony. The Court should dispose of Norkin's meritless case.

I. NORKIN ADMITS THAT HE LACKS STANDING TO COMPLAIN OF THE LOSS OF HIS ALLEGED INTEREST IN BRITESTARR

In its opening memorandum, Piper argued that Norkin lacked standing to assert what appeared by far to be the greater part of his $10 million damages claim: the allegation that Piper's alleged misconduct caused him to lose his interest in Britestarr's shares. In support of its motion, Piper argued (at 8-12) that the shares belonged to Norkin's bankruptcy estate and that Norkin's Chapter 7 trustee was, therefore, the only person with standing to assert such a claim.

Although he opposes Piper's motion, Norkin now expressly agrees that he has no right to damages for the loss of his alleged interest in the Britestarr shares. See Opposition at 6 n. 1 ("plaintiff acknowledges that the stock is an asset of the estate and therefore, it is the trustee's prerogative to sue for damages resulting from the loss of the stock"). Indeed, Norkin expressly disclaims any intention to assert a claim for those damages. See id. at 6 ("plaintiff is not seeking in this action damages resulting from the loss of plaintiff's ownership of Britestarr stock").

To circumvent his lack of standing, Norkin has now limited his claim to whatever salary and other, unspecified "benefits" he might have received out of a $1 million settlement offer (see id. at 7), which, he previously said, he would "never" have accepted. In the process, Norkin has effectively disposed of well over nine-tenths of his $10 million claim for damages. His prior testimony disposes of the rest.

II. NORKIN'S AFFIDAVIT DOES NOT "AMPLIFY" OR "EXPLAIN" HIS TESTIMONY, BUT RATHER CONTRADICTS IT

At his deposition in the Britestarr case on October 28, 2004, Norkin swore that Piper represented Britestarr and that it had performed legal services for him only in a "small estate matter." See Schreiber Aff., Ex. A, pp. 149-50. His prior testimony contrasts markedly with his current allegations, including his allegations:

- that, "[i]n the spring [of] 1999," he "retained Piper to assist him and Britestarr in advancing [a] transaction with ABB" (Complaint, ¶ 8) (emphasis added);
- that from 1999 onward various Piper lawyers "assisted Britestarr and Norkin in advancing the transaction" (see id., ¶¶ 9-11) (emphasis added);

- that "Piper, as counsel for Norkin and Britestarr, reviewed documents relating to the ownership . . . of the Britestarr shares, and gave plaintiff advice in his personal capacity as to the ownership of the shares" (id.,¶ 16) (emphasis added);

- that Piper failed to advise him of a settlement offer that "would have enabled [him] to settle ABB's claim in his personal bankruptcy proceeding over the ownership of the Britestarr shares" (id., ¶ 17); and

- that Piper, instead, advised him, evidently in his personal capacity, "to resign as Britestarr's president." Id., ¶ 19.

Although Norkin recognizes that he cannot create a genuine dispute of material fact by merely contradicting his prior testimony,[1] he claims the right to "amplify" or "explain" his answers to what he calls "ambiguous" questions. Opposition at 10-11, citing Rule v. Brine, Inc., 85 F.3d 1002, 1011 (2d Cir. 1996). Accordingly, Norkin has now submitted an affidavit in which he asserts that Piper represented him personally in connection with his resignation as Britestarr's president.

To justify his effort to "explain" or "amplify" his prior testimony, Norkin must engage in a series of intellectual acrobatics. For example, in response to a broad, open-ended question about whom Piper represented, Norkin admits that he answered, "Britestarr," but he now claims that the "context" of the question was limited to "Britestarr's initial retention of Piper." Opposition at 8. Similarly, in response to a question about whether Piper "did" or "opened up" anything for him besides a single "small estate matter," he admits that he answered, no, but he now claims that he was answering only the second part of what he calls an "ambiguous, compound question" (albeit one to which neither his attorney nor Britestarr's objected on the ground of form). Id. at 8-9. Norkin's justifications do not withstand scrutiny.

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[1] See Opposition at 10. For some of the many Second Circuit authorities on this subject, see Brown v. Henderson, 257 F.3d 246, 255 (2d Cir. 2001); Margo v. Weiss, 213 F.3d 55, 60-61 (2d Cir. 2000); Bickerstaff v. Vassar College, 196 F.3d 435, 454-55 (2d Cir. 1999), cert. denied, 530 U.S. 1242 (2000); Trans-Orient Marine Corp. v. Star Trading & Marine, Inc., 925 F.2d 566, 572 (2d Cir. 1991); Mack v. United States, 814 F.2d 120, 124-25 (2d Cir. 1987); Perma Research and Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969).

The "context" of the initial question could not have been more clear: it followed several pages of questions and answers concerning Piper's relationship with Britestarr and Norkin, as well as the dispute (and enmity) between ABB, on one hand, and Britestarr and Norkin on the other. If Norkin truly believed that Piper represented him, individually, at any time during that dispute or at any time during Piper's representation of Britestarr, he had every opportunity to say so then. Indeed, given that Norkin had just entered into an agreement under which Britestarr's attorney promised to underwrite this lawsuit against Piper (Schreiber Aff., Ex. O), he had every incentive to say so. It is, therefore, too late for him to change his testimony now.

It is also too late for Norkin to complain that he meant something other than what he said when he voluntarily qualified his answer by interjecting that Piper represented him only in a small estate matter. Neither on his own nor in response to the direct, follow-up question that immediately ensued did Norkin mention any other matter, including the matter in which he now claims Piper represented him. In view of his silence when he had the opportunity (and obligation) to speak, the Court should disregard his "last-minute conversion." Brown v. Henderson, 257 F.3d 246, 256 (2d Cir. 2001).

In his affidavit, Norkin complains that Piper did not ask additional questions that, he says, would have forced him to disclose the information in his affidavit; Piper, however, had no reason to ask such questions. Norkin first answered a general, open-ended question about the identity of Piper's client, naming "Britestarr." Then, he voluntarily qualified his answer to state that Piper represented him personally in connection with a "small estate matter." Having unequivocally asserted that Piper represented Britestarr (and that it represented him only in that one minor matter), Norkin cannot now argue that he would have been more forthcoming if only he had been asked more specific questions. FDIC v. Wrapwell, 2002 WL 14365, at *16 (S.D.N.Y. 2002).

This is not a case like Palazzo v. Corio, 232 F.3d 38 (2d Cir. 2000), on which Norkin relies. There, the teenaged defendant testified vaguely, at his deposition, that he had moved from New York to his grandparents' house in Pennsylvania because he "just wanted to live there." Id. at 41. On the sole basis of that scrap of testimony, the plaintiff argued that the defendant could not dispute that he was domiciled in Pennsylvania. Id. at 43. Rejecting the plaintiff's attenuated argument, a magistrate judge permitted the defendant to explain that he had moved because of a "'disagreement'" with his parents over his performance in school, but that he continued to attend college in New York, that he paid tuition in New York as an in-state resident, that he had a job in New York, that he paid taxes in New York, and that virtually all of his personal belongings remained in New York. Id. at 41. Because the defendant had never testified that he intended his move to be permanent, the Second Circuit affirmed the decision to allow him to amplify or explain what he meant when he said that he "just wanted to live" in Pennsylvania. Id. at 43.

Here, by contrast, Norkin had nothing to amplify or explain. After naming "Britestarr" as Piper's client, Norkin voluntarily amended his answer to state that Piper represented him personally only in a "small estate matter," not in any of the other matters listed in his affidavit or his complaint. Norkin cannot, therefore, claim the protection of the cases that allow a person escape from inconvenient, prior testimony by attempting to "explain" or "amplify" what he had said.

In a final attempt to evade the consequences of his prior testimony, Norkin argues (at 11-12), that he was unrepresented by counsel at the deposition and that counsel for Britestarr "had no reason to cross-examine him on the issue" of whether Piper represented him or Britestarr. Yet as Piper previously pointed out (Plaintiff's Memorandum at 13-14 & nn. 6-7), Norkin was represented at the deposition both by his personal bankruptcy counsel and by Britestarr's counsel, who examined him at length, objected to Piper's examination, and even instructed Norkin not to answer questions. Indeed, far from having no reason to examine or cross-examine Norkin, Britestarr's counsel had, by then, agreed to underwrite this very case against Piper and, in exchange, had received an interest in Norkin's recovery in this very case. See Plaintiff's Memorandum at 13 n. 6; Schreiber Aff., Ex. O. In the circumstances, it defies credulity for Norkin to depict himself, as he does now, as some kind of lawyerless naif who, in his ignorance, gave a few unfortunate answers that no one had an incentive to clarify.

The Second Circuit has long held that "'[i]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.'" Mack v. United States, 814 F.2d 120, 124-25 (2d Cir. 1987), quoting Perma Research and Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969). Because this principle applies squarely to Norkin's submission of a sham affidavit to contradict his prior testimony, the Court should enter summary judgment against him. Id.

III. NORKIN DID NOT BECOME PIPER'S CLIENT BY VIRTUE OF HIS ALLEGED STATUS AS BRITESTARR'S SOLE SHAREHOLDER

Norkin argues (at 12-17) that because he claims to have been Britestarr's sole shareholder, he has standing to sue Piper, as counsel for Britestarr, even if Piper never represented him personally. While one New York court has held that a corporation's sole shareholder can claim the status of a third-party beneficiary of the attorney-client relationship between the corporation and its attorneys,[2] the case has no application here, where the corporation had become insolvent, where there was a dispute as to whether Norkin actually was the shareholder, and where Norkin himself had other attorneys.

Norkin admits (at 21) that by the spring of 2002 "Britestarr was out of cash" – i.e., that it had become insolvent. But because of the corporation's insolvency, its interests were no longer identical with those of its putative shareholder, Norkin. Instead, by the time the corporation became insolvent, the obligations of its fiduciaries – its officers and directors – had shifted from the shareholder to the corporation's creditors, who became "stakeholders" in the corporation as well. See, e.g., Adelphia Comms. Corp. v. Rigas (In re Adelphia Comms. Corp.), 323 B.R. 345, 386 & n. 140 (S.D.N.Y. 2005) (collecting authorities). In these circumstances, where the creditors' rights took precedence over those of the putative shareholder, and where the creditors' rights might actually conflict with those of a shareholder, it makes no sense to say that, by operation of law, the corporation's lawyers represented the shareholder as well.

In any event, even if a corporation's lawyers could still represent a shareholder after the onset of insolvency, Norkin admits that in 2002 there was a dispute (and, indeed, litigation) about whether he was, in fact, the corporation's true shareholder. For example, Norkin admits that at some unidentified time, for some undisclosed reason, his ex-wife, Friema Norkin, acquired "record ownership" of the shares. See Complaint, ¶ 14. He also admits that, as security for a loan to Britestarr, his ex-wife pledged her shares to Lloyds Bank. See id. He further admits that Lloyds Bank retained possession of the shares even after his ex-wife conveyed her interest in them to him. See id. Finally, he admits that in 2001, after purchasing Lloyds Bank's rights in the shares, "ABB commenced a lawsuit in Norkin's bankruptcy proceedings[,] contending that Friema Norkin was the rightful owner of the Britestarr stock shares." See id., ¶ 15. Norkin makes no attempt to explain how Piper could simultaneously represent both the corporation and him, as the putative sole shareholder, in the midst of this legal dispute about whether he was really was the corporation's sole shareholder.

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[2] Good Old Days Tavern, Inc. v. Zwirn, 259 A.D.2d 300, 300 (1999). It is difficult to reconcile Zwirn with the many cases, in New York and elsewhere, that hold that corporate counsel does not thereby become counsel for the corporation's officers, directors, or shareholders. See generally 3 Ronald E. Mallen, et al., Legal Malpractice § 25.9, at 772 & n. 4 (5th ed. 2000) (collecting authorities). Contrary to Norkin's suggestion, Zwirn certainly does not follow from the Court of Appeals' decision in Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood, 80 N.Y.2d 377 (1992), which merely held that in some, limited circumstances, a borrower's attorney may have a duty to make accurate representations to a lender.

Finally, in an effort to distinguish Griffin v. Anslow, 17 A.D.3d 889 (2005), Norkin acknowledges (at 17) that if individual shareholders have their own, individual legal representation, the corporation's attorneys do not represent them. See Griffin, 17 A.D.3d at 891. Norkin, however, does not disclose that he had personal counsel to represent him the specific matters in which he now says Piper represented him – namely, his Connecticut bankruptcy case and the lawsuit, in the Connecticut bankruptcy case, concerning whether he or his ex-wife owned the Britestarr shares. See Schreiber Aff., Ex. N. Norkin's own arguments, therefore, confirm that Piper did not and could not represent him.[3]

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[3] Ironically, even as Norkin argues that Piper had a duty to him because of its representation of Britestarr, Britestarr has argued that Piper breached its duty to the corporation by allegedly favoring Norkin's interests over the corporation's. In view of the inherent and irreconcilable tension between those allegations, Piper could not conceivably have represented Norkin solely because of its representation of Britestarr.

IV. "NEVER" MEANS "NEVER"

Norkin complains that in the spring of 2002 Piper failed to inform him that ABB had allegedly offered to settle its claims on the same terms that it had proposed a year earlier. He claims now that he would have accepted those terms had he only known that they were available.

At his deposition, however, Norkin testified that he "would have rejected" those terms (Schreiber Aff., Ex. A, at 181) and that he would "never have signed" an agreement containing them. Id., Ex. A, at 170. Indeed, he broke off the questioning on the specific terms of the proposal, stating that none of the terms would have been "acceptable." Id., Ex. A., at 179.

Confronted with the contradiction between his testimony and his allegations, Norkin has submitted an affidavit describing the change in circumstances between 2001, when he dismissed ABB's terms as a "joke," and 2002, when he now claims that he had no choice but to accept them. His affidavit ignores the fact that, even after he had learned full well of the change in circumstances, even after Britestarr had gone into bankruptcy, even after he had resigned as Britestarr's president, and even after he had entered into an agreement under which Britestarr's counsel would subsidize this suit against Piper, Norkin still testified that he would "never" have accepted those proposals. Schreiber Aff., Ex. A, p. 170. Because Norkin cannot create a genuine dispute of material fact by submitting an affidavit to contract his prior testimony, the Court should enter summary judgment against him. See, e.g., Mack, 814 F.2d at 124-25, citing Perma Research, 410 F.2d at 578; see also Brown v. Henderson, 257 F.3d at 255; Margo v. Weiss, 213 F.3d 55, 60-61 (2d Cir. 2000);

Bickerstaff v. Vassar College, 196 F.3d 435, 454-55 (2d Cir. 1999), cert. denied, 530 U.S. 1242 (2000).[4]

In the face of the irreconcilable conflict between his prior deposition testimony and his new affidavit, Norkin is reduced to arguing (at 23-24) that the Court cannot dismiss his case merely because it might appear to be "implausible." This case, however, is more than merely implausible; it is unworthy of credence. Because of Norkin's refusal to answer specific questions about ABB's specific proposals on the ground that they were a waste of his time and his adamant assertion that he "would never have signed" an agreement containing those terms, no reasonable juror could possibly credit Norkin's new-found enthusiasm for those alleged proposals. As long as "never" still means "never," the Court should enter summary judgment in Piper's favor.

V. CONCLUSION

For the foregoing reasons, the Court should dismiss the complaint or enter summary judgment in Piper's favor.

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[4] Attempting to salvage his claim, Norkin argues (at 22) that, in response to Britestarr's questions in his deposition, he testified that he was "chagrined" to hear that ABB had allegedly made some unspecified proposal and that had he known of it, Britestarr "wouldn't have gone into Chapter 11." Upon further examination, however, it became clear that his statement was nothing more than a glib generality lacking both in substance and in factual basis: When he was actually called upon to state whether he would have accepted the specific terms of any specific proposals that ABB might have offered, he testified that he "would have rejected" them, that "none" would have been acceptable, and that he "would never have signed" an agreement containing those terms. In view of his specific factual admissions, Norkin cannot defeat summary judgment with a single, conclusory assertion to the contrary.

Dated: New York, New York
January ___, 2006.

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AFFIDAVIT OF SERVICE

I, CONSTANCE S. SELLARS, being duly sworn, depose and state: I am over 18 years of age, am not a party to the foregoing action and reside within the City of Baltimore, State of Maryland.

On the nineteenth day of January, 2006, I caused the within Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss or, Alternatively, for Summary Judgment to be served by delivering a true copy thereof enclosed in a sealed wrapper to the exclusive care of the United States Postal Service, with sufficient postage, to the counsel of record as follows:

Richard M. Asche, Esquire
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45 Broadway, 30th Floor
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____
Constance S. Sellars

Sworn to before me this
day of January 2006

____
Notary Public

Seal of Notary Public